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APR 16 1973

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 72-826

IGNATIUS J. BROUSSARD, JR., PETITIONER

v.

COLONEL RODERICK R. PATTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF MEMBERS AND FORMER MEMBERS OF CONGRESS FOR LEAVE TO FILE BRIEF AMICI CURIAE ON MOTION FOR REHEARING OF DENIAL OF THE PETITION FOR CERTIORARI, AND BRIEF

AMICI CURIAE

HON. JAMES ABOUREZK	HON. JOHN MOAKLEY
HON. HERMAN BADILLO	HON. WAYNE MORSE
HON. GEORGE E. BROWN	HON. JOHN MOSS
HON. JOHN CONYERS	HON. WAYNE OWENS
HON. RONALD V. DELLUMS	HON. CHARLES RANGEL
HON. DON EDWARDS	HON. THOMAS REESE
HON. WILLIAM FULBRIGHT	HON. DONALD RIEGLE
HON. ERNEST GRUENING	HON. BENJAMIN ROSENTHAL
HON. MICHAEL HARRINGTON	HON. F. PETE STARK
HON. FLOYD K. HASKELL	HON. ANDREW YOUNG
HON. HENRY HELSTOSKI	HON. STEPHEN YOUNG
HON. ROBERT KASTENMEIER	

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Amici Curiae hereby respectfully move for leave to file the accompanying brief in support of the motion of petitioner for rehearing of the denial of the petition for certiorari herein and to support the granting of certiorari. George T. Altman, attorney for petitioner, has consented to the filing of this amici

curiae brief. The Solicitor General, attorney for respondent, has declined to grant consent because the brief amici curiae relates to a petition for rehearing but stated he will not oppose this motion.

INTEREST OF AMICI CURIAE

Amici Curiae are present and former members of the United States Senate and the House of Representatives, the sole bodies empowered by the Constitution to declare war, Article I, Section 8 (11). As such, they have a vital interest in obtaining a clarification of the respective powers of Congress and the President to commit the Armed Forces of the United States to extended hostilities.

ISSUES NOT PRESENTED BY THE PARTIES

The issue raised before this Court by petitioner failed to bring to the Court's attention the fundamental Constitutional issues implicit in this case. The courts below have interpreted an enactment of Congress tolling the statute of limitations for desertion from the Armed Forces "in time of war," 10 U.S.C. § 843(a), without giving any consideration to the significance of the Constitutional delegation to Congress alone of the power to declare war. When Congress passes a statute applicable only "in time of war,"

it must presumptively be read in light of the constitutional power of Congress to declare war. Otherwise, the case below would support an inference that Congress recognizes the power of the Executive alone to commit the nation to war. Such recognition was never intended by Congress. It therefore becomes vital to the national security for this Court to offer some guideline as to the power of the President to engage the Armed Forces in hostilities without a Congressional declaration of war. Mr. Justice Douglas has pointed out that the failure of the courts to clarify these constitutional issues has contributed to the unprecedented national disunity over the Vietnam conflict. Holmes v. United States, 391 U.S. 936 (1968) (dissenting opinion to denial of certiorari).

Respectfully submitted,

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ARGUMENT

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

Never in the history of the Republic has this Court given definitive guidance on what may be the most significant constitutional issue of all: the power of the President, absent a Congressional declaration of war, to send the Armed Forces of the United States into battle in foreign countries, except on a temporary, emergency basis.[1] The events in

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[1] Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv. L. Rev. 1771, 1778 (1968).

Vietnam over the last ten years and the widespread national disagreement over the powers of the President in Vietnam demonstrate the necessity for constitutional guidance at this time. The considerations which persuaded this court to decline to review the "legality" of the Vietnam conflict while hostilities were still underway[2] have been diminished or eliminated by the termination of hostilities, the withdrawal of American forces and the release of American prisoners. In the face of a growing constitutional crisis of authority involving the legislative and executive branches of government, this Court should perform its historic role of constitutional arbiter.

The questions presented by this case are of "great magnitude," "large and deeply troubling" and, as Mr. Justice Stewart anticipated in his dissent to the denial of certiorari in Mora v. McNamara,[3] the issue will not go away

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[2] U.S. v. Mitchell, 369 F.2d 323 (2d Cir.), cert. den., 386 U.S. 972 (1967); Mora v. McNamara, 387 F.2d 862 (D.C. Cir.), cert. den., 389 U.S. 934 (1967); Holmes v. U.S., 387 F.2d 781 (7th Cir. 1967), cert. den., 391 U.S. 936 (1968); Massachusetts v. Laird, 400 U.S. 886 (1970). See Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970).

[3] 389 U.S. 934 (1967).

simply by refusing to hear any particular case. Rather, the issue will continue to be presented to the lower courts. The case at bar demonstrates that the courts cannot avoid a determination of whether the nation was "at war" in Vietnam. Petitioner Broussard's prosecution for desertion was barred by the statute of limitations unless he had deserted "in time of war." The power of military courts to try civilians[4] and the applicability of the higher penalties for sabotage[5] also require a judicial finding that the nation is "at war." Thus the question is not whether this issue should be judicially decided, but rather whether an issue of such magnitude will be left to the conflicting decisions of the lower federal constitutional courts,[6]

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[4] 10 U.S.C. § 802(10). Other sections of the Uniform Code of Military Justice which require a determination of whether the nation was at was are 10 U.S.C. §§ 843(a), (e) and (f), 885(c), 890, 901, and 906. See Note, 67 Mich. L. Rev. 841 (1969).

[5] 18 U.S.C. § 2153.

[6] Broussard v. Patton, 466 F.2d 816 (9th Cir. 1972); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971), cert. den., 404 U.S. 869 (1971); Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970).

state courts,[7] military courts[8] and other con-constitutional federal courts (e.g., Court of Claims).[9]

I

CONGRESS AND THE PRESIDENT BOTH REQUIRE CONSTITUTIONAL GUIDANCE ON THEIR WAR-MAKING POWERS

Except for the two great World Wars, Vietnam has cost more American lives than any foreign conflict in our history. Yet the legal basis for the conflict remains questionable and obscure. Successive administrations have often relied on the 1964 Gulf of Tonkin resolution as the basis for Presidential authority in Vietnam, yet the conflict continued after that resolution was repealed by Congress.

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[7] Jackson v. North Amer. Assurance Soc. of Virginia, 212 Va. 177, 183 S.E.2d 160 (1971); Freed v. Baldi, 166 Colo. 344, 443 P2d 716 (1968), app. dis. 393 U.S. 317 (1969).

[8] U.S. v. Averette, 41 C.M.R. 363 (1970); U.S. v. Anderson, 38 C.M.R. 386 (1968).

[9] Robb v. U.S., 456 F2d 768 (Ct. Cl. 1972).

Cambodia was invaded without any specified legal authority except for a general purpose to protect American troops in Vietnam, a "domino" theory which may be endless -- Thailand to protect Cambodia, Burma to protect Thailand and ultimately perhaps China to protect all the former.

In essence, some Presidents have asserted the right to commit the Armed Forces for extended combat anywhere in the world without Congressional approval. The most definitive statement of this position is the State Department Memorandum "The Legality of the United States Pacticipation in the Defense of Vietnam"[10] which asserted that the powers of the President under Article II to conduct foreign affairs and act as Commander-in Chief includes "the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States." In a shrinking world, the Memorandum asserted, "an attack on a country far from our shores can impinge directly on the nation's security." Finally, the Memorandum claimed that "the Constitution leaves to the President the judgement to determine" when national security is threatened so that our Armed Forces can be

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[10] 54 Dep't State Bull. 474 (1966), reprinted 75 Yale L.J. 1085.

committed without consulting Congress.[11]

Such a claim of Presidential power is hardly in keeping with the separation of war-making powers as it was originally conceived. The Constitution wisely denied to the President the broad power asserted above by the Executive when it vested in Congress the power to declare war. Hamilton, in the Federalist papers, noted that the President would be Supreme Commander but would not have the powers of the British King to declare war and raise armies, "all which by the Constitution under consideration would appertain to the Legislature."[12]

The need to preserve to the democratically elected representatives of the people the power to declare war is greater that ever today when the subtleties and complexities of the President's power to conduct foreign affairs make possible a gradual, often imperceptible, change from aiding a foreign government to sending American armed forces into battle. As Mr. Justice Frankfurter warned, "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disin-

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[11] 75 Yale L.J. at 1100, 1101.

[12] The FEDERALIST, No. 69 at 465.

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terested assertion of authority."[13] An agreement between governments to furnish economic assistance expands to include military assistance, followed by personnel to train the foreign troops, then advisors in the field of combat, troops to protect the advisors or give logistic support, and finally full-scale commitment of American forces to the conflict. Congress is then faced with a fait accompli and the issue before Congress is not the one given it by the Constitution, shall a war commence, but rather the support of a war already begun by the Executive.

The Vietnam conflict may very well have provided us with an example of a war in which the President could not have obtained a majority of Congress to declare war, but once having committed our forces and with the conflict raging, had little trouble mustering a Congressional majority to give material support to our men fighting in the field. Congressional appropriations for American troops fighting abroad do not necessarily involve approval of the decision to send troops nor do they authorize the waging of an expanded war. The more urgent the situation presented to Congress as a fait accompli, the less should an appropriation be regarded as consent to the action.

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13 Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952)(concurring opinion).

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Senator Aiken (R.-Vt.) exemplified this Congressional dilemma in the debate of the 1965 Southeast Asian Emergency Appropriations Act, stating: "Mr. President, I wish to make it plain that my vote is not intended as an endorsement of the costly mistakes of the past, nor as authority to wage war in the future unless such war is declared by Congress."[14]

A procedure which places Congress in such a dilemma perverts the constitutional scheme so carefully detailed by the Framers and deprives Congress and the people of the most fundamental of Congress' constitutional powers -- the power to decide to go to war or not to go to war. "A strong case can be made for the proposition that compliance with the Constitution of the United States and its plain provision that the power to declare war lies, not in the President, but in the Congress, should be made to rest upon something better than the ambivalences of congressional inaction or mere defense legislation, appropriations and questionable resolutions..." Mottola v. Nixon, 318 F. Supp. 538, 553 (1970).

It is apparent that Congress and the President require from this Court guidance on the significance of appropriations as a sanction for already on-going

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[14] 111 Cong. Rec. 9499 (1965).

military actions. Similarly, the power of the President to take military action under a Congressional Resolution short of a declaration of war is in need of clarification. The potential danger in the use of such resolutions is illustrated by the Gulf of Tonkin Resolution. Many members of Congress thought they were authorizing only a limited response to an attack on American naval vessels by a small North Vietnamese craft,[15] but successive Presidents have cited that Resolution as authority for a full scale war in Southeast Asia.[16]

Congress itself is considering legislation to reassert its constitutional authority to declare war. There are more than 20 bills pending in Congress concerning the war powers of Congress and the Executive. Those that were filed before the Vietnam cease-fire agreement[17]

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15 Documents Relating to the War Power of Congress, the President's Authority as Commander-in-Chief and The War in Indochina, Committee on Foreign Relations, United States Senate, 91st Cong., 2nd Session, (1970) at 105.

16 Statement of Nicholas D. Katzenbach, Senate Committee on Foreign Relations, U.S. Committments to Foreign Powers, S. Rept. No. 797, 90th Cong., First Sess. 82(1967).

17 93rd Congress, First Sess. H.Con. Res. 44, H.R. Nos. 179,233,407; Senate Bills Nos. 2,8,48,212.

deal solely with that particular conflict. They prohibit the expenditure of funds for the deployment of troops in Vietnam, Cambodia and Laos and the bombardment of those countries and provide for the withdrawal of all American Forces. Safeguards providing for the direct defense of withdrawing troops are allocated to the President with the proviso that he report all such activities promptly in a written report to Congress. Other bills are more broadly concerned with the delegation of constitutional authority for deployment of United States Armed Forces in military hostilities.[18] These bills establish rules and guidelines governing the use of the Armed Forces in absence of a declaration of war by Congress. The effectiveness of such proposals, however, depends on Presidential acknowledgement of the authority of Congress and the limits of Presidential power. Neither acknowledgement appears to have been forthcoming.[19]

The case at bar presents an opportunity for this Court to play its historic role of delineating the powers of the respective branches of government. Although no precise definition of when the nation is "at war", applicable for all purposes, may be feasible, at least some guidance

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18 93rd Congress, 1st Sess. H.J. Res. Nos. 2, 96; H.R. Nos. 317, 414, 454; S.440.

19 See Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970) at 545.

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will be afforded the nation and its government. For example, this Court could reaffirm the basic principle of the Civil War Prize Cases[20] that the President may not initiate war but is empowered to resist foreign invasion or suppress domestic insurrection. This basic distinction between the use of armed force to protect the country at home on the one hand and engage in foreign military actions on the other is as vital today as it was in 1862, indeed more so because of the speed with which military forces can be sent into battle anywhere in the world. At this juncture, with no American force engaged in battle, the moment is ripe for judicial guidance on these important Constitutional issues.

II

THE CASE IS APPROPRIATE FOR REVIEW BY CIVILIAN COURTS

Habeas corpus is an appropriate vehicle for review herein because the determination of whether petitioner deserted "in time of war"[21] goes to the jurisdiction of the trial court. If the statute of limitations had run at the time of petitioner's trial, petitioner was at

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20 67 U.S. 635 (1862).

21 10 U.S.C. § 843(a).

least de facto and arguably de jure a civilian no longer subject to military jurisdiction. Under Air Force Regulations, AFR 35-73 #21, "a peacetime deserter whose trial is barred by the statute of limitations" should not be returned to military control. Thus the issue of whether petitioner deserted in time of war or peace goes to the jurisdiction of the military courts to try petitioner and is reviewable by the civilian courts in an action for habeas corpus.

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